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Nos. 82-5279 and 82-5331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ARTHUR DIXSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

JAMES LEE HINTON, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR PETITIONER JAMES LEE HINTON

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QUESTION PRESENTED

Whether petitioner, an employee of a private corporation which was the sub-grantee of Community Development Block Grant funds, was a public official within the meaning of Title 18 United States Code § 201(a).

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OPINION BELOW

The opinion of the court of appeals (J.A. 75) is reported at 683 F.2d 195.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 1982. The petition for writ of certiorari was filed on August 31, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 Section 201(a) provides

For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

Title 18 Section 201(b) provides

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent:

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty; or

* * *

Title 18, Section 201(c), United States Code provides

Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; or

(2) being influenced to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud on the United States; or

(3) being induced to do or omit to do any act in violation of his official duty; or

* * *

shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

STATEMENT

Petitioners James Lee Hinton and Arthur Dixson were named in an eleven count indictment returned by a federal grand jury for the Central District of Illinois on March 12, 1981. James Hinton was charged with nine counts of bribery in violation of 18 U.S.C. § 201(c)(1) and with one count of being an accessory to bribery under 18 U.S.C. § 201(c)(2). The indictment alleged that on certain dates, Hinton and Dixson as "public officials" "solicited . . . and received . . ." money in exchange for awarding housing rehabilitation contracts. (J.A. 3). Hinton filed a pretrial motion to dismiss the indictment on the grounds that he was not a "public official" within the meaning of 18 U.S.C. § 201. (J.A. 9). This motion was denied, and, following a jury trial Hinton was convicted on all counts. The trial court denied Hinton's timely motions for new trial and in arrest of judgment, and sentenced Hinton to a term of 7½ years imprisonment on counts I-VI to be followed by three years probation on counts VIII-X. (J.A. 24).

During 1979, the City of Peoria, Illinois (hereinafter referred to as Peoria) was the recipient of over one million dollars in Community Development Block Grant funds from the United States Department of Housing and Urban Development (HUD) (R.110). The block grant funds were made available by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301-5320 (Supp. III 1979). The grant funds were to be used by Peoria for various community development activities,

including the rehabilitation of residential structures. (R109-110). Once in receipt of the block grant funds, Peoria could, pursuant to the Act and its regulations, contract with a local, non-profit organization which in turn would administer the expenditure of the grant monies. (R110-111). United Neighborhoods, Inc. (hereinafter referred to as U.N.I.) was a private, non-profit corporation engaged in community service, located in Peoria, Illinois. (R123). In 1979 and 1980 Peoria and U.N.I., through its chairwoman Helen Chandler, entered into a series of agreements. (J.A. 41, 50, 54, 61, 65, 70). Under the terms of these agreements Peoria granted sums of money to U.N.I to fund a housing rehabilitation program which was operated by that organization. In May of 1980, Peoria and U.N.I. entered into a final grant agreement. This agreement contained an additional provision whereby U.N.I. warranted it would be subject to the Copeland Anti Kickback Act and the Davis Bacon Act. (J.A. 70, 71-Ex. 25). The grants included money for salaries for U.N.I. employees. (J.A. 41, 54). The money Peoria gave to U.N.I. originated from the Community Development Block Grant funds given to Peoria by HUD. (R125).

James Hinton was employed by U.N.I. as housing rehabilitation coordinator. (R265). He was hired in March, 1979 by the U.N.I. board of directors. (R265). Hinton's duties included soliciting bids from contractors for work under U.N.I.'s housing rehabilitation program. (R265-266). Hinton was to submit housing rehabilitation contract proposals to the U.N.I. Housing Committee which was to approve and award all contracts. (R226-232). Hinton had no actual authority to award housing rehabilitation contracts. (R266). At trial a contractor named Ora Logsdon testified that he received contracts for rehabilitation work on ten houses pursuant to an

agreement with Hinton and Dixson, whereby he paid them 10% of the amount of each contract. (R166-167). Another contractor, Gerald Lilly testified that he paid a bribe to Dixson in return for receiving a rehabilitation contract on one house. (R78).

On July 8, 1982 the United States Court of Appeals for the Seventh Circuit affirmed the convictions of petitioners. The court held that the extent of federal involvement in the block grant program was such that Hinton and Dixson were acting for or on behalf of the United States in their administration of federal funds under the program, and were therefore "public officials" under 18 U.S.C. § 201(a). (J.A. 79).

SUMMARY OF ARGUMENT

1. James Hinton was not a "public official" as defined by 18 U.S.C. § 201(a), and therefor his conviction for bribery under 18 U.S.C. § 201(c) must be reversed. 18 U.S.C. § 201(a) defines "public official" to include an "officer or employee, or a person acting for or on behalf of the United States . . ." Since petitioner was not a federal officer or employee, the question becomes whether he was an individual "acting for or on behalf of the United States."

A. Analysis of § 201(a), its legislative history and case law demonstrates that there must be a contractual or agency relationship between petitioner and the federal government before he can be deemed to be acting for or on behalf of the United States. Such a relationship is lacking in the present case, and the facts disclose that the real nexus between petitioner and the federal government consists of the presence of federal block grant funds. At best the definition of "public official" as contained in § 201(a) is ambiguous in its application to petitioner.

Accordingly this Court should apply the rules previously enunciated in *Krichman* v. *United States*, 256 U.S. 363, *Rewis* v. *United States*, 401 U.S. 808 and *United States* v. *Bass*, 404 U.S. 336. Any ambiguity with respect to the ambit of the term "public official" should be resolved by limiting it to those persons specifically contemplated by Congress, namely, federal officers or employees or individuals who perform activities for the government through a contractual or agency relationship.

B. Petitioner was not acting "for or on behalf of the United States" by reason of the Housing and Community Development Act. (42 U.S.C. § 5301-5325) (The Act).

An analysis of the Act and its regulations, along with the relationship between HUD, the City of Peoria, U.N.I., and petitioner reveal that petitioner was not acting for the federal government. Federal involvement in the block grant program does not serve to elevate petitioner to the status of public official. The correct test for determining status as a public official is that advanced by the Second Circuit in the cases of *United States* v. *Del Toro*, 513 F.2d 656 and *United States* v. *Loschiavo*, 531 F.2d 659, namely, the particular individual's relationship to the federal government. Applying this test to the facts at bar, it is clear petitioner was not a "public official" within the meaning of 18 U.S.C. § 201(a). Accordingly, petitioner's conviction under 18 U.S.C. § 201(c) must be reversed.

ARGUMENT

I.

JAMES HINTON, AS AN EMPLOYEE OF A PRIVATE CORPORATION WHICH WAS THE SUB-GRANTEE OF COMMUNITY DEVELOPMENT BLOCK GRANT FUNDS, WAS NOT A "PUBLIC OFFICIAL" WITHIN THE MEANING OF SECTION 201(a).

Title 18 United States code § 201(a) defines "public official" to include an officer or employee, or a person acting for or on behalf of the United States or any department, agency, or branch of government thereof including the District of Columbia, in any official function, under or by authority of any such department, agency or branch of government.

This case turns on the question of whether petitioner was acting for or on behalf of the federal government. The Seventh Circuit below held that the extent of federal involvement in the block grant program was such that Hinton was acting on behalf of the United States in his administration of federal funds under the program.

Petitioner submits that the Seventh Circuit erred in holding that he was a "public official" because the basis of that Court's holding, federal involvement in the Community Development Block Grant Program, is an inappropriate test for determining petitioner's status as a "public official."

A.

A DIRECT AGENCY OR CONTRACTUAL RELATIONSHIP BETWEEN PETITIONER AND THE FEDERAL GOVERNMENT MUST BE PRESENT FOR PETITIONER TO BE A PERSON ACTING FOR OR ON BEHALF OF THE UNITED STATES PURSUANT TO § 201(a).

The current bribery statute, 18 U.S.C. § 201, was enacted in 1962 along with conflict of interest legislation

found at 18 U.S.C. § 201-225. (Act of Oct. 23, 1962. Pub. L. 87-849 76 Stat. 1119). Prior to 1962, there were a number of different statutes in the federal code dealing with bribery. § 201 served to substitute a single comprehensive section proscribing the offense of bribery for these various statutes. Insofar as the bribery statute is concerned, Senate Report 2213 states in pertinent part:

> A secondary feature of the bill is substitution of a single comprehensive section of the criminal code for a number of existing statutes concerned with bribery. *This consolidation would make no significant changes of substance, and more particularly, would not restrict the broad scope of the present bribery statutes* as construed by the courts. S. Rep. No. 2213 87 Cong. 2nd Sess. reprinted in U.S. Code Cong. & Ad. News at 3853. (emphasis supplied).

The section by section analysis of § 201 contained in Senate Report 2213 states regarding § 201(a):

> The term "public official" is broadly defined to include officers and employees of the three branches of government, jurors and other persons carrying on activities for or on behalf of the government. U.S. Code Cong. & Ad. News at 3856.

In enacting § 201, it is clear Congress intended to codify the existing bribery statute and not to significantly change the manner in which the courts had been interpreting prior bribery laws. The enunciated objective of consolidating the bribery law into one statute, and the absence of any protracted discussion of the definition of "public official," indicates that Congress intended the bribery statute to embrace only the activities involving officials or employees of the federal government or their agents encompassed within the ordinary meaning of these terms.

The Senate Report specifically states the consolidation ". . . would not restrict the broad scope of the present bribery statutes as construed by the courts." At first glance, this statement sounds as though the bribery statute was intended to encompass a class of individuals beyond officers, employees or agents of the government. However, when the cases interpreting the current bribery statute and its predecessors are analyzed, it becomes clear that the courts have been mainly confronted with factual situations involving officers and employees of the government or their agents—fact situations which plainly do not involve the circumstances presented in the case at bar.

Judicial interpretations of the scope of prior bribery statutes are contained in *Becharias* v. *United States*, 208 F. 142 (7th Cir. 1913) immigration inspector; *Chiarovollotti* v. *United States*, 60 F.2d (7th Cir. 1932) federal prohibition agent; *Sears* v. *United States*, 264 F. 257 (1st Cir. 1920) material inspector maintained by federal government in a factory producing shoes for the Army; *Felder* v. *United States*, 9 F.2d 872 (2d Cir. 1925) attorney general or his assistants; *United States* v. *Haas*, 163 F. 908 (2d Cir. 1908) statistician for the Department of Agriculture; *United States* v. *Bordonaro*, 253 F. 477 (D.C.N.Y. 1918) member of a local draft board; *Nordgren* v. *United States*, 181 F.2d 718 (9th Cir. 1960) federal game warden; *United States* v. *Levine*, 129 F.2d 745 (2d Cir. 1942) employee of market administrator directly appointed by Secretary of Agriculture; *United States* v. *Kessel*, 62 F. 57 (D.C. Iowa 1898) physician appointed by the federal board of pensions; *Harlow* v. *United States*, 301 F.2d 361 (5th Cir. 1962) civilian employee of military

post exchange; *Fulks* v. *United States*, 283 F.2d 259 (9th Cir. 1960) warehousemen on Air Force base.[1]

Cases defining the term "public official" under the current 18 U.S.C. § 201 include *United States* v. *Gallegos*, 510 F. Supp. 1112 (D.C.N.M. 1981) state employee working under direct supervision of federal employee in administration of grant program; *United States* v. *Hollingshead*, 672 F.2d 751 (9th Cir. 1982) employee of federal reserve bank; *United States* v. *Lumbowski*, 277 F. Supp. 713 (N.D. Ill. 1967) employee of Internal Revenue Service; *United States* v. *Kirby*, 587 F. 876 (7th Cir. 1978) grain inspectors licensed by U.S.D.A. and acting for that agency; *United States* v. *Griffin*, 401 F. Supp. 1227 (S.D. Ind. 1975) area management broker for HUD operating under a contract with that agency.[2]

All these cases indicate the bribery statute is directed at officers and employees of the federal government or their agents, and are authority for the proposition advanced here that a "public official" does not include the employee of a sub-grantee like petitioner Hinton.

With respect to the definition of the term "public official," the House Report on § 201(a) states:

> "Subsection (a).—'Public official' is given a comprehensive definition, covering all government officers and employees, including jurors. The term is then used in the substantive subsection to indicate those to whom the substantive provisions are applicable, thereby achieving a uniform application of the stat-

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[1] These cases are a representative sample of decisions interpreting the public official issue under prior statutes and do not represent an exhaustive list of all decisions under prior bribery laws.

[2] Two second Circuit cases which support petitioner's position, *United States* v. *Del Toro*, 513 F.2d 656 and *United States* v. *Loschiavo*, 531 F.2d 659, are dealt with in Part B of this brief.

> ute to all persons acting for the government. The phrase—
>
> person acting for or on behalf of the United States, or any department, agency, or branch of government thereof, in any official function, under or by authority of any such department, agency, or branch of government—
>
> is used, as in the present sections 201 and 202, to include within the statutory coverage those persons who perform activities for the Government, as, for example, through a contractual arrangement. (See: *United States* v. *Levine*, 129 F.2d 745, for a judicial construction of the comparable language in the present law.)" *House Report 748*, "Bribery, Graft and Conflicts of Interest," House Reports, Vol. 5, H.R. 748, Bribery, Graft and Conflicts of Interest at pp. 15, 16, 1st Sess.

House Report 748 mandates the conclusion that Congress intended an agency or contractual relationship to be present in order for an individual to be ". . . acting for or on behalf of the United States." The House Report goes on to cite the case of *Levine* v. *United States*, 129 F.2d 745 (2d Cir. 1942) to illustrate what the above phrase means. *Levine* involved a bribery prosecution under the statute then in effect which made it a crime to bribe ". . . an officer of the United States or persons acting for or on behalf of the United States or of Congress in an official capacity." § 117 Cr. Code 18 U.S.C. § 207, 35 Stat. at L1109. Pursuant to the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture appointed a Market Administrator for the New York City area. The Market Administrator was also compensated and subject to removal by the Secretary. Defendant was employed by the Market Administrator. His duties consisted of receiving market surplus claims from milk handlers and checking them for accuracy. He was charged with accepting a bribe from a milk producer. Defendant contended that he

was not a "public official" under the bribery statute. The Second Circuit held that as an employee of the Market Administrator, Levine was ". . . acting for or on behalf of the United States." 129 F.2d at 747.

By citing *Levine* in House Report 748, the drafters of § 201 demonstrates the type of relationship or nexus with the federal government that was necessary in order for a person to be ". . . acting for or on behalf of the United States." Levine's employer was appointed and compensated by the Secretary of Agriculture. There was a direct contractual relationship present between defendant's employer and the federal government. The Market Administrator and, therefore, the defendant were carrying out tasks delegated directly by the Secretary of Agriculture.

The factual situation in the instant case falls far short of the contractual circumstances presented in *Levine*, and therefore cannot be included in the term "public official" as intended by § 201 and those who drafted this statute. In the case at bar, there is no contractual relationship between the federal government and Hinton, or his employer, U.N.I. Petitioner was hired by U.N.I., and is answerable to that organization. The sole nexus between the federal government and petitioner consisted of federal funds which were present through the grant from the City of Peoria to U.N.I.

Criminal statutes, such as the bribery statute under review here, must be narrowly construed. The statute is ambiguous as to whether or not the conduct in question falls within its province; this ambiguity should and must be resolved in favor of the person charged. *Krichman* v. *United States*, 256 U.S. 263 (1922); *Rewis* v. *United States*, 401 U.S. 808 (1971); *United States* v. *Bass*, 404 U.S. 336 (1971).

In 1922, the United States Supreme Court in *Krichman* refused to include every person performing tasks for the government within the proscription of the bribery statute. The case involved a bribery prosecution, under § 39 of the Criminal Code, which made it clear to bribe ". . . any officer of the United States, or any person acting for or on behalf of the United States in any official function, under or by authority of any department of office of the government thereof." § 39 Crim. Code 25 Stat. at L1096. In 1917, pursuant to an Act of Congress, the President took possession and control of the nation's transportation systems. The railroads were controlled and operated by the Director of General Railroads. In *Krichman*, the defendant bribed a baggage porter employed by the Pennsylvania Railroad while it was under the control and being operated by the federal government. At issue was whether the porter was a person acting for or on behalf of the United States in an official function. The Court, through Mr. Justice Day, noted:

> The statute creating the offense was passed long before there was any thought of the government taking over the railroads. That does not prevent its application if the thing done offends against it. It is however a circumstance to be considered in determining whether the situation is one intended to be dealt with by Congress. (256 U.S. at 366)

The Court declined to recast the bribery statute from one embracing officials and those discharging official functions ". . . into one including every person discharging any sort of duty while the government is in control of the work." (256 at 367).

Holding that the baggage porter was not acting for or on behalf of the United States in an official function, the Court stated:

> While criminal statutes are to be given a reasonable construction, ambiguities are not to be solved so as to embrace offenses not clearly within the law. We are unable to remedy the uncertainties of this statute by attributing to Congress an intention to include a baggage porter with those who discharge official duties in the operation of a railroad controlled by an officer of the government. (256 U.S. at 367, 368).

Rewis involved a prosecution under the Travel Act 18 U.S.C. § 1952, which prohibited interstate travel in furtherance of criminal activity. The defendants ran a gambling operation near the Florida state line which was frequented by out-of-state bettors. Defendants themselves never crossed state lines in furtherance of their operation. The Court held that conducting a gambling operation frequented by out-of-state bettors, without more, does not constitute a violation of the Travel Act. The Court noted that the legislative history of the Act, although limited, indicated that § 1952 ". . . was aimed at organized crime and more specifically, at persons who reside in one state while operating or managing illegal activities located in another." (401 U.S. at 811).

The Court concluded that even if more support for an expansive reading of the statute was present, ". . . ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (401 U.S. at 812).

In *Bass*, defendant was convicted of possessing firearms in violation of 18 U.S.C. § 1202(a)(1) which provides that a person convicted of a felony ". . . who receives, possesses or transports in commerce or affecting commerce . . . any firearm . . ." should be punished as prescribed therein. The Court held that it was not clear from the language and legislative history of § 1202(a)(1) whether or not receipt or possession of a firearm by a convicted felon had to be connected with interstate com-

merce, and, therefore, the ambiguity must be resolved in favor of the narrower reading that a nexus with interstate commerce must be shown with respect to all three offenses contained in § 1202(a)(1).

The rules enunciated by the Court in *Krichman*, *Bass*, and *Rewis* should be applied in this case; and any ambiguity as to the class of persons ". . . acting for or on behalf of the United States," must be resolved in favor of a narrow reading. That class should be restricted to those persons specifically contemplated by Congress as evidenced by the statute and its legislative history—namely, persons with a direct contractual or agency relationship with the federal government.

In sum, petitioner insists that a proper analysis of the statute requires this Court to hold that 18 U.S.C. § 201(a) can only encompass officers and employees of the federal government, or those individuals performing activities for the government pursuant to a contractual or direct agency relationship.

B.

PETITIONER WAS NOT AN OFFICIAL OR AN EMPLOYEE OF THE FEDERAL GOVERNMENT AND WAS NOT ACTING FOR OR ON BEHALF OF THE UNITED STATES AS A RESULT OF THE INVOLVEMENT OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT AND ITS ACCOMPANYING REGULATIONS.

The Seventh Circuit held that because the Housing and Community Development Act was involved, the petitioner became an agent of the United States, and was thus acting for or on behalf of the United States causing petitioner to fall within the confines of § 201. This holding by the Seventh Circuit is absolutely incorrect.

An analysis of the Housing and Community Development Act and the relationship between HUD, the City of

Peoria, U.N.I., and petitioner compels the conclusion that petitioner was not acting for or on behalf of the federal government. The Community Development Block Grant funds given to the City of Peoria were authorized by the Housing and Community Development Act of 1974. 42 U.S.C. § 5301-5320 (Supp. III. 1979).

The primary purpose of the Act is to develop viable urban communities by providing decent housing and expanding economic opportunity for persons of low and moderate incomes. Federal assistance is to be provided to support community development activities which are directed at specific objectives. 42 U.S.C. § 5301(c). Another purpose of the Act is to ". . . further the development of a national urban growth policy by consolidating a number of complex and overlapping programs of financial assistance of varying sizes and needs into a consistent system of federal aid . . ." 42 U.S.C. § 5301(d). The Act authorizes the Secretary of the Department of Housing and Urban Development to make grants to states, cities and other units of local government, to be used in the manner consistent with the objectives of the Act, 42 U.S.C. § 5303. In order to be eligible for the block grant funds, the recipient must file with the Secretary of HUD a statement of objectives and a projected use of the grant funds. 42 U.S.C. § 5304. Once the recipient's plan is met with the Secretary's approval, implementation of the plan is the responsibility of the recipient. 42 U.S.C. § 5303. The Act further provides that once the funds are received, the City or other unit of local government may provide that its plan be implemented by granting funds to a local, non-profit community organization. 42 U.S.C. § 5303(15) 24 CFR 570.204(a). However in such a case, the recipient still bears ultimate responsibility for ensuring that the grant funds are utilized in a manner consistent with the recipient's objectives. 24 CFR 570.204(b).

Once the City received the Community Development Block Grant funds, it had the obligation of utilizing the funds consistent with the purpose of the Act and its own statement of objectives. Peoria had the option of administering the grant funds itself, or it could make grants to a local organization which would then spend the money in accordance with the City's objectives. Moreover, the choice of which local non-profit organization was to receive the grants was left to the City. It is clear that the City functioned under the Act as more than a mere conduit for federal funds. The City's function was to seek implementation of its statement of objectives, and it used the federal funds for this purpose. In this case, Peoria chose to contract with U.N.I. to administer the grant funds through a housing rehabilitation program. The contracts between the City of Peoria and U.N.I. revealed that U.N.I. was acting for the City of Peoria and carrying out the City's obligation. Each contract between the City and U.N.I. provided in part:

> Whereas the services and programs developed, operated and administered by U.N.I. benefit the people of the City of Peoria;
>
> Whereas U.N.I. provides needed services which might otherwise become direct or indirect obligations of the City of Peoria; . . . (J.A. 41, 50 54, 61, and 65).

This language is consistent with the HUD regulation on sub-grantees. Analysis of 24 CFR 570.204 makes it clear that the sub-grantee is acting on behalf of the recipient. It provides:

> "General grant assistance may be used by applicants to provide block grant funds for *activities designed to implement the applicant's strategies for economic development and neighborhood revitalization* set forth in this section to be carried out by a non-profit

> entity, a neighborhood based non-profit organization, local development corporation or Small Business Investment Company (SBIC)." (emphasis added).

The Seventh Circuit below held that Hinton was a "public official" based on the extent of the federal involvement in the Community Development Block Grant program. (J.A. 79) It is true that the statute and its regulations provide for federal supervision and monitoring of the block grant program. The type of federal involvement the Seventh Circuit found present in the block grant program will be present whenever federal funds are involved. However, the federal control provided for does not change the relationships and duties as defined by the Act. The Secretary's function under the Act is to approve a recipient's plan or statement of objectives, grant the Community Development Block Grant funds to the recipient unit of local government, issue regulations and guidelines, and terminate or withhold grant funds upon making certain findings. The function of the City was to administer the funds consistent with its own plan. The function of U.N.I. was to perform tasks delegated to it by the City of Peoria.

The record in this case disclosed that HUD in fact exercised minimal supervision once the grant funds were given to the City of Peoria. (R.108-117) Further, HUD had no contact at all with the sub-grantee, U.N.I. (R.114) The City of Peoria clearly delegated its function or obligation to U.N.I. Mr. Hinton was employed by U.N.I. which was implementing the City's strategies for community development. U.N.I. through its employees was discharging a City and not a federal function. Mr. Hinton was not employed as a substitute for a federal employee, nor was he employed for purposes of federal convenience. Therefore, Mr. Hinton was not acting for or on behalf of

the Department of Housing and Urban Development. At most he was acting on behalf of the City and performing the City's responsibilities under the Act.

The Seventh Circuit found support for its holding in the fact that the salaries of the petitioner and the costs of the rehabilitation program were funded by the federal government for federal objectives. This overlooks the fact that petitioner was employed by U.N.I. He was hired by that organization and was supervised by the U.N.I. board of directors. (R.165) While the ultimate source of Hinton's salary was the grant funds, he could only look to U.N.I. for his paycheck and not the federal government. Further, while the federal objectives are clearly expressed in the Act, these are the broad objectives concerning the development of viable urban communities. 42 U.S.C. § 5301. The City of Peoria had objectives also which were met in part by the U.N.I. housing rehabilitation program.

The Second Circuit has defined "public official" within the meaning of § 201(a) in the cases of *United States* v. *Del Toro*, 513 F.2d 656 (2d Cir. 1975), *cert den.* 423 U.S. 826 and *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976). Both cases involved bribery of the same assistant administrator of the Model Cities program in New York City.

In *Del Toro*, the defendants were charged and convicted, *inter alia*, with bribing a "public official" in violation of 18 U.S.C. § 201(b). The evidence showed that Del Toro and Kaufman had conspired to bribe one Pedro Morales, an assistant administrator of the Harlem Model Cities program. Kaufman, a lawyer and real estate broker, hoped Morales would use his influence to secure Kaufman a lease with Model Cities for a significant amount of office space for which Kaufman was the rental agent—

thus earning Kaufman a sizeable commission. Del Toro was the middle man in the transaction. Morales was a City employee. His salary was paid by the City of New York but with moneys advanced by the federal government through a grant to the City. Federal involvement was present through regulation and supervision of the Model Cities program by HUD.

The Second Circuit reversed the convictions, holding that Morales was not a "public official" within the meaning of § 201(a). The Court emphasized the modifying phrase of § 201(a) "public official" definition—the person must act ". . . under or by authority of any such department, agency or branch of federal government." (513 F.2d at 622).

Since Morales was a city employee, carrying out tasks delegated to him by his superior, another City employee, he was not acting "under or by authority of any such department, agency or branch of the federal government." Therefore, he was not a "public official" under § 201(a). The fact that the federal government financed the Model Cities program and HUD supervised Model Cities activities was not dispositive as the Court stated:

> In view of the enormous amount of funding by the federal Government on a broad spectrum which includes welfare, housing, and health, we are constrained to take a close look at the determination below and the effect of bringing clearly illegal conduct under state law within the ambit of the federal jurisdiction. (513 F.2d at 662).

In *Loschiavo*, the Second Circuit, in reaffirming *Del Toro*, enunciated the test for determining status as a "public official." It is not the type of federal project or amount of federal funding but rather, ". . . character and attributes of his employment relationship, if any, with the federal government." (531 F.2d at 661).

Thus, the Second Circuit has correctly recognized that it is not federal involvement in a particular program, but an individual's relationship to the federal government, that is determinative of status under § 201(a). In analyzing the character and attributes of petitioner's relationship with the federal government, it is apparent that, as an employee of U.N.I., Hinton was carrying out tasks delegated by the City of Peoria. He had no connection whatsoever with the federal government.

The Seventh Circuit below relied on its prior decision in *United States* v. *Mosley*, 659 F.2d 812 (1981) in concluding that petitioner was a "public official." In *Mosley*, the defendant was convicted of soliciting and receiving money in exchange for giving preferential treatment to certain individuals seeking jobs under the Comprehensive Employment and Training Programs Act, 29 U.S.C. § 801, *et seq.* (CETA). Mosley was employed in Chicago, Illinois as a CETA intake and eligibility officer by the State of Illinois Bureau of Employment Security (IBES).

The Seventh Circuit held that the provisions and history of the CETA program manifested a substantial amount of federal involvement sufficient to warrant a finding that Mosley was a "public official" acting for or on behalf of the United States Department of Labor.

Mosley **should have no applicability to the present case for two reasons. First the "federal involvement" found present in *Mosley* simply does not exist in this case. U.N.I. was selected by the City of Peoria to administer grant funds through the U.N.I. housing program. The Department of Housing and Urban Development had absolutely nothing to with U.N.I. or its housing programs. (R.114) This is typified by the fact that James Barnes, the HUD official in charge of block grants to the City of Peoria, neither knew or had a duty to know of the**

existence of U.N.I. or Hinton. (R.116) Second, the "federal involvement" test enunciated in *Mosley* is inappropriate because there will always be federal involvement to some extent whenever federal funds are involved. Carrying *Mosley* to its logical conclusion, anyone acting in a federally funded program could be said to be "a person acting for or on behalf of the United States." This expansive definition of the term "public official" is totally unsupported by the reading of the statute and legislative history.

Petitioner Hinton urges this Court to reject the holding of the Seventh Circuit, and reverse the petitioner's conviction under 18 U.S.C. § 201(c).

§ 201(a), when considered in light of its legislative history, judicial interpretations of the statute, and a plain reading of the statute itself, affords no other conclusion but that a "public official" must be either an officer or employee of the federal government, or possess a direct agency or contractual relationship with the federal government. And as set out in this brief, the facts show Hinton's conduct and relationship to the federal government in no manner falls within the proper definition of a "public official." The Seventh Circuit simply misdefined the concept of a "public official," and accordingly erred in affirming petitioner's conviction.

CONCLUSION

For the reasons stated herein, the judgment of the Seventh Circuit Court of Appeals should be reversed.

Respectfully submitted,

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